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# Notes, Comments, Digests

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# NOTES, COMMENTS, DIGESTS

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## NOTES

AIRCRAFT—COLLISION IN MIDAIR—INSTRUCTIONS—DANGEROUS INSTRUMENTALITY—APPLICATION OF FEDERAL AIR TRAFFIC RULES.—[New York] In the recent case of *Herrick, Olsen et al.* v. *Curtiss Flying Service Inc. and Byrnes,*[1] Olsen, a part owner of the Interstate Air Service Co., was receiving instructions from Herrick, an employer of the above company and a transport pilot, when they collided in midair with a plane flown by Byrnes. The latter possessed a student pilot's license and was flying "solo" at the time, under the direction of the Curtiss Flying Service, Inc. Olsen, in contrast, had no license. The planes crashed at an altitude of 400 to 500 feet in the vicinity of Mitchell Field, Long Island. The three airmen brought separate actions for personal injuries, joining the owners of the respective planes. The owners, on the other hand, instituted proceedings for damages to their planes, the Interstate Air Service (plaintiff) by separate action and the Curtiss Flying Service (defendant) by counterclaim. The actions were consolidated and tried simultaneously.

The court instructed the jury (1) that the fundamental rules governing automobile cases furnish criteria to control aviation; (2) that a duty arises by reason of the possibilities of danger; (3) that "reasonable care," the flexible means of determining the violation of the duty, was to be a standard apropos to aviation (pilots are "required to use a high degree of care, which would be the care that the great mass of men so circumstanced as they, would ordinarily use"); (4) that the Federal Air Traffic Rules applied; (5) that violations of various giving way, crossing, overtaking and landing rules,[2] were not evidence of negligence, but merely "questions which the jury may take into consideration in determining whether [there] . . . was negligence"; (6) that such violation to merit consideration had to be the proximate cause of the accident; (7) that an aircraft is not an inherently dangerous instrumentality but becomes dangerous only by reason of careless operation; (8) that the Curtiss Flying Service was to be held liable if they failed to exercise reasonable care commensurable with the dangers involved, from the use by the student; (9) that the Curtiss Company was not in the position of master and servant, but, since they were required to instruct their students as to the traffic regulations, they would be made a party to the student's violations of traffic regulations, if ignorance of such rules was the proximate cause of the injury.

The jury favored the defendants, returning a verdict of $500 for the Curtiss Flying Service on their counterclaim, and $3500 for Byrnes on his

1. Not officially reported. New York Supreme Court, Nassau County, June 27, 1932; 1932 U. S. Av. R. 110.

2. *Air Commerce Regulations, 1928*, Chap. VII, Sec. 74(a), (c), (d), (f), Sec. 75(d), 1928 U. S. Av. R. 402, 408.

cross-action. A motion for a new trial was dismissed. The judge however suggested and encouraged an appeal to be taken.

The judge in the above case formed his instructions with special diligence by reason of the case being one of first impression in America. Although it has not as yet reached final determination, it contains two interesting features that warrant discussion at this time.

I. Possibly for the first time we discover a definite judicial pronouncement that aeroplanes are not inherently dangerous. This position is feasible in view of the utility of aviation and the rapid mechanical strides that have already been made. If a plane were labeled a dangerous instrumentality, absolute liability would result; the owner would become an insurer. Something may be said for absolute liability when the injured party is one not engaged in aerial maneuvers. But when both parties are piloting or are connected with the navigation of a plane, liability must be based on the doctrine of negligence.[3] In the instant case the question of the dangerous nature of the plane was raised as a means of imposing liability upon the owner of the ship. This theory accrues as a logical extension of the "danger test" for the discovery of the existence of a duty.[4] The more dangerous the character of the vehicle, the greater its liability to do injury to others and the higher the degree of care and caution to be exercised by the person charged with the duty of its operation.[5]

An early writer in air law has advocated the application of the doctrine of *Rylands* v. *Fletcher*[6] to aviation.[7] To Mr. Hazeltine, the dangers incident to aerial activities are greater than the dangers of storing water. His opinion seems to be predicated upon the famous case of *Guille* v. *Swan*.[8] That case concerned a balloon which descended into the plaintiff's garden. Two hundred people gathered around to rescue the occupant. Their joyous missionary work resulted in much damage to plaintiff's garden. The balloonist was held absolutely liable not only for damages he himself caused, but also for damages occasioned by those who assisted him. The balloon was thought to be a dangerous instrumentality by reason of its being unmanageable. When once it goes up, it is bound to come down somewhere, but where?

The doctrine thus announced has not been extended. At the time Mr. Hazeltine wrote, aeronautics was crude. With advance in the science there has come liberality of thought as to the imposition of liability. An appropriate quotation reads:

". . . today aircraft cannot be classified as a dangerous instrumentality in the legal acceptance of the phrase. Flying has now become too common and relatively too safe to admit of such a label. Indeed it is doubtful if

3. *Nokes & Bridges,* The Law of Aviation (1930), p. 105.
4. *Brett,* M. R., in *Heaven* v. *Pender,* 11 Q. B. D. 503 (1883): ". . . whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Cf. *Green,* Judge and Jury (1930), pp. 65-74.
5. *Graham* v. *Hagman,* 270 Ill. 252, 110 N. E. 337 (1915); *Weil* v. *Kreutzer,* 134 Ky. 563, 121 S. W. 471 (1909); *Commonwealth* v. *Hofofall,* 213 Mass. 232, 100 N. E. 362 (1913); *Bryant* v. *Grizan Valley Oil Co.,* 163 S. E. 773 (W. Va., 1932).
6. L. R., 3 H. L. 330 (1868—Eng.).
7. *Hazeltine,* Law of the Air (1911), pp. 86, 87.
8. 19 Johns 381 (1822).

any court today would follow the doctrine of *Guille* v. *Swan* for the reasons expressed in the opinion."[9]

The instructions in the case under discussion make reference to the law of automobiles to ascertain aerial ability. In regard to the dangerous nature of mechanical transportation contrivances, the analogy to automobiles is fertile.[10] During the development stage of automobile travel, occasional instances appear where the motor driven vehicle is looked upon as a dangerous instrumentality. An example appears in a statute of Great Britain requiring a motor vehicle to travel at a speed not exceeding four miles an hour and to be proceeded by a man bearing a red flag.[11] There are a few cases in America that seem to extend liability to owners of automobiles on the ground that they are dangerous instrumentalities. In *Southern Cotton Oil Co.* v. *Anderson,*[12] the court recognized that human intervention is necessary to make automobiles dangerous; still it was ready to call them inherently dangerous. The decision was enforced by reason of statutes which regulate automobile activity on the basis of their being dangerous. The reasoning, thus adopted, besides being very unsatisfactory, is obiter dictum. The court upon a rehearing admitted that liability would attach without necessitating the label of an automobile as inherently dangerous. In *Weil* v. *Kreutzer,*[13] an automobile was held to be more dangerous than a street car. Street cars and locomotives are inherently dangerous. In another situation regulations of automobiles were challenged as being discriminatory. They were constitutionally upheld on the ground that they frightened horses and therefore increased the dangers of travel.[14]

An automobile, however, by the great weight of authority is at present not a dangerous instrumentality or dangerous per se.[15] That is to say, it is not in the same category as dynamite or ferocious animals which do not require human intervention to effect injuries, nor of locomotives which are ponderous machines incapable of precise handling, and subject to many statutory obligations.[16] The dangers result from the personal element in motoring rather than from the very nature of the vehicle.[17] "It is not the ferocity of automobiles that is to be feared but the ferocity of those who drive them."[18]

The distinction thus drawn between an instrument dangerous in its very nature and dangerous only as a result of human handling has been

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9. *Hotchkiss*, Aviation Law (1928), Sec. 30, p. 40.
10. *Hotchkiss*, op cit., Sec. 33; *Zollmann*, Law of the Air (1927), Sec. 107, Uniform State Law of Aeronautics, Sec. 6.
11. *Berry*, Law of Automobiles (4th ed., 1924), pp. 8, 9.
12. 80 Fla. 441, 86 S. 629 (1920).
13. 134 Ky. 563, 121 S. W. 471 (1909).
14. *Christy* v. *Elliott*, 216 Ill. 31, 74 N. E. 1035 (1905); *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 85 N. E. 848 (1908).
15. *Martin* v. *Lilly*, 188 Ind. 139, 121 N. E. 443 (1919); *Whitelock* v. *Dennis*, 139 Md. 557, 116 Atl. 68 (1921); *McGowan* v. *Longwood*, 242 Mass. 337, 136 N. E. 76 (1922); *Hartley* v. *Miller*, 165 Mich. 115, 130 N. W. 336 (1911); *Elliott* v. *Harding*, 107 Ohio St. 501, 140 N. E. 338 (1923); *Cooley* on Torts (4th ed., 1932), Vol. III, Sec. 506, p. 493.
16. *Felder* v. *Davidson*, 139 Ga. 509, 77 S. E. 618 (1913); *Premier Motor Mfg. Co.* v. *Tilford*, 61 Ind. Ap. 164, 111 N. E. 645 (1916); *Danforth* v. *Fisher*, 75 N. H. 111, 71 Atl. 535 (1908); *Vincent* v. *Candall-Godley & Co.*, 131 App. Div. 200, 115 N. Y. S. 600 (1909); *Phila. & Reading Ry. Co.* v. *Derby*, 14 How (U. S.) 468, 14 L. Ed. 502 (1852).
17. *Parker* v. *Wilson*, 179 Ala. 361, 60 S. 150 (1912); *Tyler* v. *Stephen's Adm'r.*, 163 Ky. 770, 174 S. W. 790 (1915); *Stapleton* v. *Independent Brewing Co.*, 198 Mich. 170, 164 N. W. 520 (1917).
18. *Lewis* v. *Amorus*, 3 Ga. Ap. 50, 59 S. E. 338, 340 (1907).

called legal sophistry.[19] The distinction is similar to that made between instruments inherently and imminently dangerous. While it is often difficult to categorically place activity on one or the other side of any line of demarcation, based upon degrees of judgment, yet the distinction may profitably serve in the placing of liability. In the automobile setup, an owner is not liable for injuries caused by someone who is using his machine unless he is in the position of master to a servant, and the servant is acting within his employ.[20] The owner of an instrument inherently dangerous is subject to a more severe measure of liability.[21] When possessed of such property, he owes a duty to keep it within his control. He may be held for injuries by a servant even when not in the performance of his master's duties.[22] Even though an automobile has been extracted from the dangerous instrumentality class, nevertheless it is an instrument with dangerous propensities. It is likely to cause injuries if not used reasonably, and in that respect is imminently dangerous. If intrusted to a person whom the owner knows or should know is incompetent, liability will then transcend the negligent person and in addition be attached to the owner of the machine.[23]

When an automobile is defective so as to be made unmanageable, the resultant owner's liability will follow.[24] A defective wheel was the basis for imposition of liability upon a manufacturer even though not a party to a contract of sale.[25] The machine by reason of the defect became inherently dangerous.

In the instant case, the court rightly instructed the jury that an aeroplane was not a dangerous instrumentality. The result is to shift some of the risk of aviation from the owner to the operator. It also prevents the fastening of an undesirable precedent, in view of the assurance of future progress in aviation. Liability could still be placed upon the owner if he permitted an incompetent individual to operate under unfavorable conditions or circumstances.[26] If the analogy to automobile travel is valid, and I think it is, then reason certainly justifies the result. "Surely the smoothly gliding aeroplane on its unobstructed roadbed of air is no more a dangerous piece of machinery than is the deadly automobile on the highly congested thoroughfare."[27]

II. Secondly, the instructions contain the first judicial expression wherein a state applied the Federal Air Traffic Rules in state activity. The judge attempts to place the reason for this judicial adoption upon constitutional grounds by saying the rules were in aid of interstate commerce and that a government field was being utilized. The obvious necessity of having traffic rules to govern aerial activity seems to be the real basis for the court's acceptance of the Federal Rules. New York, at the time the accident occurred, had not passed any state air traffic regulations.

19. *Barmore* v. *Vicksburg S. & P. Ry. Co.*, 85 Miss. 426, 38 S. 210 (1905). But cf. dissent.
20. *Parker* v. *Wilson*, cit. note 17; *Martin* v. *Lilly*, cit. note 15; *Whitelock* v. *Dennis*, cit. note 15; *Danforth* v. *Fisher*, cit. note 16.
21. *Southern Cotton Co.* v. *Anderson, Phila. & Reading Ry. Co.* v. *Derby*, cit. note 16.
22. *Felder* v. *Davidson*, cit. note 16; *Tyler* v. *Stephen's Adm'r.*, cit. note 17.
23. *Elliott* v. *Harding*, cit. note 15; *Parker* v. *Wilson*, cit. note 17.
24. *Texas Co.* v. *Veloz*, 162 S. W. 377 (Tex., Ct. of Civ. App., 1913).
25. *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).
26. *Graham* v. *Hagman*, cit. note 5; note 23, supra.
27. *Zollmann*, op. cit. note 10, Sec. 113.

The application of the federal rules was further facilitated by a prevailing custom in consonance with those rules.

It has been pointed out that the simple rules of the road are not sufficient for aeronautic activity. The definite limits upon air maneuvering without suffering a "fall," furnishes the reason.[28] A more complicated set of rules was needed and was supplied first by the United States Secretary of Commerce[29] and then by various state commissions who were given that power by the legislatures.[30]

Many have expressed a desire to have uniform traffic rules. "Conflicting rules instead of preventing collisions would tend to produce them."[31] Congress has authorized the Secretary of Commerce to promulgate air traffic rules ". . . as to safe altitude of flight and rules for the prevention of collisions between vessels and aircraft."[32] The Federal Air Traffic Rules that were thereby prescribed assume to cover various phases of flying. They would seem to cover all flying to which the rules apply, whether interstate or intrastate, in order to prevent undue burdens upon interstate and foreign commerce.[33] Operators in the field have acceded to the application of these federal rules. State legislatures have recognized their effect by authorizing administrative bodies to prescribe rules and regulations that shall conform and coincide with the federal rules.[34] Federal regulations have by several states been incorporated into state legislation by reference.[35] Incorporation by reference would tend to indicate that federal rules of themselves are not applicable within state jurisdiction. The practice however certainly shows a desire for uniformity of regulations.

The court in the instant case rightly ruled that the federal rules were applicable. Certain phases of aviation should only be subject to one central regulatory body. Air traffic rules, in the absence of local peculiarities, seem to require such unified control. At present, centralization in the federal government appears as the only possibility. In New York where the case now being discussed arose there was not any air traffic rules until 1930[36] Under such circumstances the federal rules should certainly be applied.

28. *Zollmann*, op. cit., Sec. 68, p. 50.
29. *Air Commerce Regulations, 1928*, Sec. 74, 1928 U. S. Av. R. 402.
30. *Cahill's* Ill. Revised Stat. (1931), Chap. 5a, Sec. 10: Air Traffic Rules of Illinois Aeronautic Commission.
31. *Zollmann*, op cit. note 10, Sec. 68, p. 51.
32. *Air Commerce Act of 1926*, 44 Stat. L. 568, Sec. 3, Subs. (e), 1928 U. S. Av. R. 333.
33. *Fixel*, The Law of Aviation (1927), pp. 108-115.
34. *Ala.*, L. 1931, No. 739, Sec. 2, 1931 U. S. Av. R. 311; *Alaska*, L. 1929, Ch. 75, Sec. 3, 1929 U. S. Av. R. 393; *Idaho*, L. 1931, Ch. 145, Sec. 3(e), 1931 U. S. Av. R. 338; *Ky.*, L. 1930, Ch. 11, Sec. 6, 1930 U. S. Av. R. 391 (identical with federal rules); *Me.*, L. 1929, Ch. 265, Sec. 3, Sec. 6, Sec. 7, 1929 U. S. Av. R. 574; *Md.*, L. 1929, Ch. 318, Sec. 15, Sec. 19, Sec. 21, 1929 U. S. Av. R. 580; *Minn.*, L. 1929, Ch. 290, Secs. 5-7, 1929 U. S. Av. R. 629; *Neb.*, L. 1929, Ch. 34, Sec. 7, 1919 U. S. Av. R. 661 (duty placed upon commissioner); *N. H.* L. 1929, Ch. 182, Sec. 7, Sec. 8, 1929 U. S. Av. R. 670; *N. J.*, L. 1931, Ch. 190, Sec. 7, 1931 U. S. Av. R. 403; *N. M.*, L. 1929, Ch. 71, Sec. 7, 1929 U. S. Av. R. 689; *N. D.*, L. 1929, Ch. 85, Sec. 2, 1929 U. S. Av. R. 711; *Tenn.*, L. 1931, Ch. 73, Sec. 2, 1931 U. S. Av. R. 454; *Vt.*, L. 1931, No. 126, Sec. 2, 1931 U. S. Av. R. 464; *Va.*, L. 1930, Ch. 291, Sec. 3775-b, 1930 U. S. Av. R. 505.
35. *Idaho*, L. 1929, Ch. 137, Sec. 2(f), 1929 U. S. Av. R. 493 (marking and identification of air navigation facilities); *Kansas*, L. 1931, Ch. 6, Sec. 3, 1931 U. S. Av. R. 359 (Violation of federal regulations subject to prosecution); *Michigan*, L. 1929, No. 177, Sec. 2, 1929 U. S. Av. R. 608 (Board may deviate therefrom however when deemed necessary for public safety); *Rhode Island*, L. 1929, Ch. 1435, Sec. 13, 1929 U. S. Av. R. 802; *Washington*, L. 1929, Ch. 157, Sec. 5, 1929 U. S. Av. R. 862; *West Virginia*, L. 1931, Ch. 4, Sec. 2, 1931 U. S. Av. R. 468; *Wisconsin*, L. 1929, Ch. 348, Sec. 114.21, 1929 U. S. Av. R. 878.
36. *N. Y.*, L. 1930, Ch. 289.

There has been a controversy centered on the question of federal or state jurisdiction over aeronautics. It is submitted that an enlightened judicial attitude such as achieved in the instant case may be a means of realizing uniformity under federal supervision, without necessitating legislative intervention. The relief thus afforded is minimized however by the possibilities of constitutional annihilation by the United States Supreme Court.

LEO FREEDMAN.

## COMMENTS

AIR EXHIBITIONS—NEGLIGENCE—FALLING BALLOONS—TRESPASS.—[Louisiana] Defendants are the owners and operators of a carnival. One of the advertised attractions was a balloon ascension and parachute jump—the balloon being so constructed that the gas was released and the balloon fell, without control, after the aeronaut had left it. While the defendant's show was operating near plaintiff's residence, and on the day and at the time of such a balloon ascension, a balloon fell on plaintiff's house, causing damages. Plaintiff sued to recover these damages, alleging that the balloon was operated by, and under the direction of, the defendants. Defendants admitted that a balloon ascension was advertised by them, but alleged that it was conducted by an independent contractor and denied that the balloon which fell on plaintiff's house was owned by them or that it was sent up by them or by any of their agents or employees. At the trial, plaintiffs offered no evidence to connect defendants with the balloon in question and a judgment was entered against them—defendants offering no evidence. Plaintiffs now claim that their failure of proof was due to a misapprehension, caused by a "misreading" of the answer, that defendants had admitted their connection with the balloon, and, therefore, that they should have been granted either a new trial or a non-suit: *Held:* that the absolute judgment for defendants was proper. *Lansing* v. *Miller,* 140 So. 79, 1932 U. S. Av. Rep. 45 (La. App. 1932).

On the narrow ground on which the decision is placed, the case is clearly correct, since the plaintiffs, as the court points out, failed to show even that the balloon was the one which, admittedly, ascended from defendant's grounds.[1] There is, however, some language in the opinion which seems to indicate that the defendants were free from liability for damage caused by a balloon operated by an independent contractor.[2] This is a problem which has received some attention by the courts in previous similar cases. In most of the early balloon ascension cases, the injuries complained of occurred *on the grounds* of the defendant and liability was predicated on the theory that there had been a failure to provide proper safeguards, without regard to whether or not the aeronaut was an employee or an independent contractor[3] A few cases, however, have involved accidents to

1. "For aught that the testimony shows, this balloon may have come from a great distance and may not have ascended from the defendants' show grounds." 140 So. 79, 80 (La. App. 1932).

2. "In fact . . . the outstanding contention (in the answer) is that the balloon was owned and operated by an independent contractor in such a manner as to free defendants from all liability for any accidents that might happen in connection therewith."

3. *Peckett* v. *Bergen Beach Co.,* 44 App. Div. 559, 60 N. Y. S. 966, 1928 U. S. Av. Rep. 99 (1899); *Roper* v. *Ulster County Agric. Soc.,* 136 App. Div. 97, 120 N. Y. S. 644, 1928 U. S. Av. Rep. 102 (1909); *Platt* v. *Erie County*

persons near the aviation field. In the early case of *Canney* v. *Rochester Agricultural and Mechanical Association*[4] the facts closely paralleled those alleged in the instant case and the court held the operator of the show liable, on the ground that one who contracts for work which is likely to cause damage to others cannot evade responsibility by employing an independent contractor[5] and that to send up a balloon which was to be allowed to fall without control was an inherently dangerous enterprise. It is submitted that this is the better view. It does not at all imply any absolute liability, but merely imposes on the person directly responsible for, and securing the financial benefit from, the flight liability for damage which he must (or should have) foreseen and prevents him from insulating himself from that liability by the imposition of an "independent contractor" —frequently judgment proof.

ROBERT KINGSLEY.

AIRPORTS—CONDEMNATION—ELECTRIC POWER LINE—POTENTIAL USE OF ADJACENT LAND AS AIRPORT.—[Illinois] The plaintiff electric company sued to condemn certain lands for a transmission line. In these lands one defendant had the life estate and another the remainder. Defendants in a cross-petition asked damages for adjacent land not taken on the ground that the construction of the power line would destroy the potential use of the land as an airport, a use for which it was peculiarly fitted. For damages to these fifty-eight acres the jury gave the defendants $3300. The plaintiff appealed to the Supreme Court. *Held:* reversed and remanded. *Rockford Electric Company* v. *Browman,* 339 Ill. 212, 171 N. E. 189 (1930).

The error of the lower court in instructing the jury that they might consider the potential use of the land as an airport in determining damages was, apparently, the main reason for the reversal of the case. Since the enactment of the Constitution of 1870 damages have been granted in Illinois for injury to adjacent property as well as for the taking of the property condemned.[1] But "the provision in the Constitution of 1870 was not intended to reach every possible injury"; there must be "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and by reason of such disturbance," he must have "sustained a special damage with respect to his property in excess of that sustained by the public generally.[2] Nor should there be an allowance for "imaginative or speculative damages or such remote and inappreciable ones as the imagination can conjure up as liable to happen in the future"; rather "the dam-

*Agric. Soc.*, 164 App. Div. 99, 149 N. Y. S. 520, 1928 U. S. Av. Rep. 116 (1914); *Smith* v. *Cumberland Agric. Soc.*, 163 N. C. 346, 79 S. E. 632, 1928 U. S. Av. Rep. 112 (1913); *Richmond & M. Ry.* v. *Moore's Admr.*, 94 Va. 493, 27 S. E. 70, 30 L. R. A. 258, 1928 U. S. Av. Rep. 86 (1897); contra: *Smith* v. *Benick*, 87 Md. 610, 41 Atl. 56, 1928 U. S. Av. Rep. 90 (1898).

4. 76 N. H. 60, 79 Atl. 517, 1928 U. S. Av. Rep. 105 (1911); and consult: *Scott's Trustee* v. *Moss.*, 17 Ct. of Sess. (4th Ser.) 32 (Scot. 1889).

5. Consult: *Bigelow* on Torts (8th ed. 1907), §11, pp. 143-146; *Burdick*, Law of Torts (4th ed. 1926), §§136-138, pp. 174-178; *Cooley*, Law of Torts (Throckmorton's Student's ed. 1930), §343, pp. 692-693; *Pollock*, Law of Torts (12th ed. 1923), pp. 530-533.

1. *Rigney* v. *City of Chi.*, 102 Ill. 64 (1882).

2. *Ill. Power & Light Corp.* v. *Talbot*, 321 Ill. 538, 547, 152 N. E. 486 (1926).

ages must be direct and proximate and not such as are merely possible or may be conceived by conjecture or surmise."[3]

The Illinois Supreme Court has previously held that in a breach of contract action the supposed adaptability of the land for a particular purpose may be considered in assessing damages.[4] In a condemnation proceeding, where the value of the land taken is in question, that land may not be valued at what it might be worth after a change of use, but its adaptability for a future use and the enhanced worth due to this adaptability may be one factor in determining its value.[5] But the sale price of the property in the future may never be the proper test of value even though it is apparent that the property is peculiarly suited to a special use.[6] Also, proof must be limited to showing the use for which the property is naturally adapted; the owner may not show to what use he intended to put the property.[7]

The lower court committed other errors, as well as this one, and there is little doubt that reversal was justified. This is, it seems, the first case of this kind to reach an appellate court. Undoubtedly there will be others.

GEORGE W. BALL.

AIRPORTS—MUNICIPAL CORPORATIONS—POWER TO APPROPRIATE FOR.—[Oklahoma] The governing body of the plaintiff city had duly certified to the defendant Excise Board an item as follows: "Airport Lease, Five Thousand Dollars." The defendant, claiming to be authorized so to do under Okla. Comp. Stats. (1921), §9698, struck out the item and the city brings mandamus proceedings to compel its approval. *Held:* (three judges dissenting) (1) The city was authorized by statute to operate an airport[1] and the amount herein fixed admittedly was within the statutory and constitutional limits of taxation. (2) The powers given to the Excise Board must be considered with relation to the distinction between (*a*) purely municipal purposes and (*b*) purpose of a municipal character in which the State has a sovereign interest.[2] As to the former, the Board has no power to interfere with the discretion of the local authorities as to whether the expenditure should be made, but has power only to see (*a*) that the purpose is one authorized by law and (*b*) that it was within the tax limits. Since the item here was within this class, the Board had no power to strike it out and mandamus should issue. *City of Ardmore* v. *Excise Board of Carter County*, 8 Pac. (2d) 2, [1932] U. S. Av. Rep. 273 (Okla. 1932).

3. *So. Ill. & Ky. R. R. Co.* v. *Johnson*, 321 Ill. 187, 191, 151 N. E. 553 (1926); *McReynolds* v. *Burlington & Ohio Ry. Co.*, 106 Ill. 152 (1883); *Ill. Central R. R. Co.* v. *Roskemmer*, 264 Ill. 103, 105 N. E. 695 (1914).

4. *Dady* v. *Condit*, 209 Ill. 488, 70 N. E. 1088 (1904).

5. *Rock Island & Eastern Ry. Co.* v. *Gordon*, 184 Ill. 456, 56 N. E. 810 (1900); *Martin* v. *C. M. Elec. Ry. Co.*, 220 Ill. 97, 77 N. E. 86 (1906).

6. *Forest Preserve Dist.* v. *Wallace*, 299 Ill. 476, 132 N. E. 444 (1921); *Martin* v. *C. M. Elec. Ry. Co.*, cit. note 5.

7. *Pinkham* v. *Inhabitants of Chelmsford*, 109 Mass. 225 (1872); *Farmer* v. *Stillwater Water Co.*, 99 Minn. 119, 108 N. W. 824 (1906); *Richmond & Petersburg Elec. Ry. Co.* v. *Seabaord Air Line Ry.*, 103 Va. 399, 49 S. E. 512 (1905). *Contra*, see *Bailey* v. *Isle of Thanet St. Ry. Co.*, 1 Q. B. 722 (1909) (where a lot was bought for a young ladies' school, then taken for railroad purposes, and it was held that the intended use might properly be considered).

1. Okla. Comp. Stats. (1921), §4507, as amended by Okla. Laws of 1929, c. 11, p. 10.

2. *Thurston* v. *Caldwell*, 40 Okla. 206, 137 Pac. 683.

The holding herein that the operation of an airport is a "purely municipal" function is in accord with the earlier cases from other jurisdictions holding that a municipal airport is a "proprietary" function exposing the municipality to liability in tort.[3]

ROBERT KINGSLEY.

AIRPORTS—NUISANCES.—[California] Plaintiff, the owner of suburban property on the outskirts of the city of Los Angeles, sued the city of Santa Monica as owner of adjacent property on which an airport was located. She alleged that defendant owner had leased its property to persons engaged in commercial aviation, resulting in the impairment of the peaceful enjoyment of her premises. Planes flying over her property at an altitude as low as 100 feet, noise, dust and refuse, parachute jumps, forced landings on her farm, and the entrance thereon of persons attracted by the airport constituted the nuisance. Defendant demurred. *Held:* Demurrer sustained. The allegations were insufficient to impose liability upon the landlord. *Meloy* v. *City of Santa Monica,* 70 Cal. App. 179, 12 P. (2d) 1072, 1932 U. S. Av. R. 17 (1932).

There are two lines of legal theory available to the courts to support the imposition of liability upon the landlord for a nuisance maintained upon his land by a tenant. The first theory is based upon ratification by the landlord.[1] It has been suggested that the acceptance of rent for premises upon which an obnoxious condition is being maintained constitutes a sufficient ratification of the harm.[2] The English rule extends liability to the landlord when he relets after the creation of a nuisance upon the premises by the tenant, or what is equivalent to a reletting, when he fails to avail himself of an opportunity to give notice to quit.[3] Few American courts have accepted either of these rules *in toto.* The American rule requires ratification to be positive.[4] It may, however, in the case of public nuisances with statutory penalties, consist in mere failure to act, if there was knowledge of the condition.[5]

The second theory upon which a landlord may be held responsible is based upon either the existence of the condition upon the land at the time of the leasing,[6] or upon the making of the lease in contemplation of a purpose which would inevitably result in the creation of an obnoxious condition.[7] If the possibility of the objectionable use be in the alternative,

3. *City of Mobile* v. *Lartigue,* 23 Ala. App. 479, 127 So. 257, 1930 U. S. Av. Rep. 50 (1930), discussed in: 1 JOURNAL OF AIR LAW 365 (1930); 27 Va. L. Rev. 81 (1930); *Coleman* v. *City of Oakland,* 110 Cal. App. 715, 295 Pac. 59, 1931 U. S. Av. Rep. 61 (1930), discussed in: 4 So. Cal. L. Rev. 316 (1931); 2 JOURNAL OF AIR LAW 436 (1931); 2 Air L. Rev. 285 (1931); *Mollencop* v. *City of Salem,* 8 Pac. (2d) 783, 1932 U. S. Av. Rep. 22 (Ore. 1932), discussed in: 3 JOURNAL OF AIR LAW 467 (1932).

1. *Rider* v. *Clark,* 132 Cal. 382, 64 Pac. 564 (1901).
2. 1 *Tiffany,* Landlord and Tenant (2nd ed. 1910), p. 686.
3. *Woodfall,* Law of Landlord and Tenant (22nd ed. 1927), p. 917; *Gandy* v. *Jubber,* 5 Best & S. 78 (1864).
4. *Keenan* v. *New Hanover County Commnrs.,* 156 N. C. 356, 83 S. E. 556 (1914); *City of Omaha* v. *Murphy Construction Co.,* 114 Neb. 583, 208 N. W. 667 (1926).
5. *State* v. *Emerson,* 90 Wash. 565, 155 Pac. 579 (1916).
6. *Kallis* v. *Shattuck,* 69 Cal. 593, 11 Pac. 346 (1886); *Gandy* v. *Jubber,* supra; *City of Chicago* v. *Atwood,* 269 Ill. 624, 110 N. E. 127 (1915).
7. *Baker* v. *Gates,* 279 Mo. 630, 216 S. E. 775 (1919); *Bd. of Freeholders* v. *Woodcliffe Land Improvement Co.,* 74 N. J. Law 355, 65 A. 844 (1907).

and the condition arise through acts of the tenant which are not essential to the purpose of the lease, the tenant alone is liable.[8]

In order to determine if a lease for the purposes of an airport contemplates an obnoxious use of the premises, inquiry must be directed to the question whether the ordinary conduct of an airport constitutes a nuisance per se. There are but few cases on this point. In these cases the courts have refused to answer the query in the affirmative, preferring to utilize in their investigations the criterion of a fair and reasonable use of the premises under the circumstances.[9] State regulations concerning airports have been regarded as an implied recognition of their right to exist, especially those statutes enabling municipalities to condemn land, under eminent domain, for the purpose of establishing airports.[10] There seems to be a tendency toward a method of approach which comprehends a recognition of the necessity of some adjustment on the part of surrounding landowners, in the interests of progress, supplemented by the adjoining of objectionable practices which are not essential to the conduct of the ariport.[11] It must be added that the United States Circuit Court of Appeals in the *Swetland* case enjoined the maintenance of the airport altogether, but that action was not a rejection of the partial injunction method adopted by the lower court; it was a difference of opinion as to the possible extent of the adjustment. In the *Gay* case, the plaintiff hospital obtained an injunction restraining the operation of the airport. Under the circumstances of that case there could be no adjustment at all. Any of the functions of the airport prevented the use of the hospital; one had to cease. The court placed the burden upon the late comer. But even this case denied the fundamental nuisance character of the airport, and proceeded upon the unusual facts above set out. The cases support the conclusion that an airport as an enterprise has a right to exist; it is only the unusual circumstances of operation and environs that render it a nuisance. Plaintiff, in the instant case, seeking to hold the landlord liable for the obnoxious acts of his tenant, without alleging their indispensability to the proper conduct of the airport itself, was waging battle against the weight of authority.

A supplementary question, indirectly introduced by the case, is whether a landlord may be liable at all for trespasses committed by his tenant off the leased property. The well established rule that continued trespasses constitute an abatable nuisance settles the question.

ROBERT L. GROVER.

8. *Lucid* v. *Citizens' Investment Co.*, 48 Cal. App. 257, 193 Pac. 161 (1920).

9. *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385, 1930 U. S. Av. R. 1 (1930), Comment, 2 JOURNAL OF AIR LAW 82 (1931); *Glatt* v. *Page* (Dist. Ct., 3d Jud. Dist. of Neb., Docket 93-115, 1928), cited in *Lowell*, "Who Is Owner of the Air Above the Land," 1 Aircraft Age 22 (1929), cited in *Wenneman*, Municipal Airports, p. 277, cited in *Sweeney*, "Adjusting the Conflicting Interests of Landowners and Aviators in Anglo-American Law," 3 JOURNAL OF AIR LAW 337 (1932); *Swetland* v. *Curtiss Airport Corp.* (C. C. A. 6th, 1931), 55 F. (2d) 201, 1932 U. S. Av. R. 1, Comment, 3 JOURNAL OF AIR LAW 293 (1932); *Gay et al. and Rush Hospital* v. *Taylor et al.* (C. P. Chester County, Pa., Sept. 8, 1932).

10. *City of Spokane* v. *Williams*, 157 Wash. 32, 288 Pac. 258, 1932 U. S. Av. R. 71 (1930); *Elliott*, "Unobstructed Airport Approaches," 3 JOURNAL OF AIR LAW 207 (1932); contra, *Gay et al. and Rush Hospital* v. *Taylor et al.*, supra (license from the Aeronautical Commission).

11. *Smith* v. *New England Aircraft Co.*, supra (unnecessarily low flying over adjoining property; *Swetland* v. *Curtiss Airport Corp.* (Dist. Ct. N. D. Ohio, 1930) 41 F. (2d) 929, 1930 U. S. Av. R. 21 (the raising of great clouds of dust); Ibid (strewing of handbills).

GASOLINE TAX—COMMERCE—STATE TAX ON GASOLINE USED IN INTERSTATE COMMERCE.—[Federal] A Wyoming statute provided that all funds received from the tax on gasoline used at any municipal air field should be paid over to the city owning such air field for the maintenance and improvement of the airport.[1] The plaintiff, engaged in interstate air transportation, had previously contracted with the cities of Cheyenne and Rock Springs, Wyoming, for the use of their municipal landing fields. The plaintiff brought suit to enjoin collection of the tax and the trial court dismissed the bill. *Held:* on appeal, that the facts were substantially the same as in the case of *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,*[2] that the tax on gasoline purchased in Wyoming was valid, and that the collection of the tax on gasoline procured by the plaintiff outside the State of Wyoming should be enjoined. *Boeing Air Transport, Inc.* v. *Edelman,* 61 F. (2d) 319 (C. C. A., 10th, Wyoming, Oct. 4, 1932).

The tax on the sale of gasoline within the state, although the gasoline is intended to be used as fuel for interstate commerce, is not such a burden on that commerce that it violates the Constitution of the United States.[3]

The Wyoming statute did not impair the obligations of the plaintiff's contract with the municipalities. If the sole ground for sustaining the tax had been a charge for the use of the landing fields, it would have been an interference with contract rights, but the validity of the tax does not rest upon that basis. Whether the proceeds of the revenue measure are used for the improvement of airports or highways is of no concern to the plaintiff so long as the tax is levied for a public purpose.[4]

RAYMOND I. SUEKOFF.

NEGLIGENCE—CARRIERS—DUTY OF AN AIR CARRIER TO PROVIDE SAFE PLACE FOR DISCHARGE OF PASSENGERS—STRIKING OF PASSENGER BY PROPELLER.—[Texas] A recent case from the court of civil appeals of Texas is the first of its type to be reported and the second to reach an appellate court. It involves the question of duty owed by an air carrier to its passengers in the disembarking of the passengers and their safe conduct from the aircraft to the hangar. In this case one Williamson was a passenger in a plane flying from Abilene to Dallas, Texas. When the plane landed at Dallas it was taxied up to the hangar and stopped facing north, to the east of the waiting room and hangar. Due to the position of the plane in parking, it was necessary for the passengers dismounting to walk around the front or the rear of the plane to get to the hangar. Deceased (Williamson) got out of the plane, started toward the front of the plane, ducked under a wing strut and was struck by a propeller. As the plane was to be used again, the motors had been left idling while the passengers were being discharged. *Held:* That it was negligence to stop the plane facing in a northerly direction; that it was negligence to discharge passengers while the propellers were still in motion; that it was negligence to fail to warn the deceased of any danger; that the carrier was negligent in failing to

1. Special Session Laws, Wyo., 1929, Ch. 14.
2. 285 U. S. 147, 52 S. Ct. 340 (1932).
3. *Eastern Air Transport, Inc.* v. *S. Car. Tax Comm.*, cit. note 2. For a discussion of the distinction between the taxes on "sale" and "use," see comment, 3 JOURNAL OF AIR LAW 309 (1932).
4. *Loan Assn.* v. *Topeka,* 20 Wall. 655 (1874).

rope off an area around the propellers; that the carrier was negligent in failing to have an employee conduct passengers from the plane to the hangar. The element of contributory negligence put forth by the defendant was entirely overruled, the court and jury deciding that none of the acts of the plaintiff constituted negligence. The opinion was, therefore, based wholly upon the duty of the carrier saying (at page 1048): "It was appellant's (the carrier's) duty to furnish Williamson a safe place to alight and a safe egress from its plane to the hangar where he desired to go." *Curtiss-Wright Flying Service, Inc.,* v. *Williamson et al.,* 51 S. W. (2) 1047, 1932 U. S. Av. R. 133 (Ct. of Civ. App. of Texas, 1932).

The authorities in line with this case are few, and not one of them has been officially reported. In *Berg* v. *Seitz,*[1] we have the same factual set-up except that there the plane in which the injured passenger had been riding was not on a scheduled run, inasmuch as it was being used, at the time the injury occurred, merely for "hopping" passengers. Counsel for the defense put forth the argument that this exempted them from the rules applying to common carriers but the court stated that the duty of the owner of a plane engaged in "hopping" passengers was no less than that of a carrier engaged in carrying passengers on scheduled routes. The other facts are the same, the plane was facing in such a manner that the passenger in leaving was forced to pass to the front or rear of the plane. Plaintiff passed to the front and was struck by the propeller. The court in ruling for the plaintiff said that the carrier was required "to exercise the highest degree of human care, skill, and foresight consistent with practical operation of the plane in question. . . . The nature of the conveyance and the great danger involved would seem to require the utmost practical care and prudence for the safety of passengers." As in the *Williamson* case, the court and jury could find no negligence on the part of the plaintiff and refused to allow the contributory negligence defense. In the case of *Hough* v. *Curtiss Flying Service, Inc.,*[2] we have the same facts except that, as in the *Berg* case, the plane was being used for "hopping" passengers. This case was found for the defendant. The only reasons that can be given for this are that the case was one of first impression, tried by a judge without a jury. The prior cases were jury cases. Another case following this line but distinguishable is *Hamilton* v. *O'Toole,*[3] where some idea is given of what will constitute contributory negligence. The defendant was engaged in "hopping" passengers. The plaintiff had been up for a flight, and after the plane landed and the pilot was turning it on the apron, he left the cockpit, stepped forward from the wing to the ground, and walked into the revolving propeller. The defendant was found negligent in failing to give the plaintiff specific instructions that she was not to leave the plane unattended. The court denied recovery because the plaintiff had been contributorily negligent in failing to look out for her own safety.

The *Berg* and *Williamson* cases, both of which allowed recovery, based the duty of the carrier on an analogy to railroad and street railway cases, saying that the duty owed a passenger by an air carrier was the same as that of any other carrier. This rule as laid down in 10 C. J. 854 (sec. 1294) is:

1. 1931 U. S. Av. R. 111; Kansas, Dist. Ct. Wyandotte County.
2. 1929 U. S. Av. R. 99; Massachusetts, Sup. Jud. Ct.
3. 1930 U. S. Av. R. 133 (1927); Massachusetts, Super. Ct. Suffolk County.

". . . the general rule may be stated to be that the carrier is bound to exercise as high a degree of skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely as the means of conveyance employed and the circumstances of the case will permit."

As stated in 4 R. C. L. 1144:

"The generally accepted rule . . . is to the effect that carriers of passengers are bound to exercise the highest degree of care, vigilance and precaution. . . . (at 1231). The duties of carriers of passengers, whether by land or water, are not limited to the mere transportation of their passengers. They are bound to provide safe and convenient modes of access . . . of departure from them, and negligence in this respect will render the carrier liable to one injured thereby."

The cases bear these rules out. In *Caley* v. *Kansas City*,[4] *Reid* v. *Minneapolis St. Ry. Co.*,[5] *Fitzgerald* v. *Des Moines City Ry. Co.*,[6] *St. John* v. *Connecticut Co.*,[7] the duty owed to passengers leaving a carrier is described as the highest degree of care. In *McCarron* v. *Erie Ry. Co.*,[8] *Malzer* v. *Koll Transp. Co.*,[9] *Lyons* v. *Pittsburgh Rys. Co.*,[10] *Griswold* v. *Chicago Rys. Co.*,[11] the rule is announced that the carrier must exercise the care which every prudent person would use under the circumstances. A typical case is *Roden* v. *Connecticut Co.*,[12] where it is said that the "duty to furnish a safe place to alight is satisfied only by the highest degree of care and skill, reasonably expectable of intelligent and prudent persons engaged as carriers, in view of instrumentalities employed and natural dangers."

Assuming this to be the law the only thing that can be questioned is whether the analogy applied by the courts is a satisfactory one, considering the difference in the types of carriers. The danger element is to be considered first, and it may be said that the danger in the air carrier is greater since a revolving propeller is always a potential source of injury. It takes some time for an aircraft motor to stop after the gasoline supply is cut off, so that the danger is foreseeable and should be guarded against. Another factor of importance is the common knowledge of the instrumentality being used by the carrier. We, as a nation, are coming to learn more and more about aircraft but it can hardly be said that an airplane is as common an instrumentality as the train. The conclusion must be that the danger of injury to the layman is greater. There is no particular reason from the operator's standpoint why a plane cannot be "taxied" into a position that affords the passengers the greatest safety in emerging therefrom. Canopies that are rolled out to the door of the plane, such as are used by some companies, afford a way of safety to the hangar and make injuries from a propeller an impossibility. Such precautions are not unreasonable and are merely an aid in carrying out the duty of any carrier to its passengers and that is supplying safety.

The real difficulty is presented, on the other hand, by airport field rules. Despite the fact that the doors to some aircraft are on the left side of the

4. 48 S. W. (2d) 25 (1932—Missouri, Kansas City Ct. of App.).
5. 171 Minn. 31, 213 N. W. 43 (1927).
6. 201 Ia. 1302, 207 N. W. 602 (1926).
7. 103 Conn. 641, 131 A. 396 (1925).
8. 10 N. J. Misc. L. 498, 159 A. 807 (1932).
9. 156 A. 639 (1931—New Jersey, Ct. of Errors and App.).
10. 301 Pa. 499, 152 A. 687 (1930).
11. 339 Ill. 94, 170 N. E. 845 (1930).
12. 113 Conn. 408, 155 A. 721 (1931).

plane, some airport field rules require right side parking—for purposes of uniformity and supposed safety. Until the equipment used by aircraft operators is uniform, as to right or left side doors, it is obvious that a practical problem is presented to operators of equipment that, as to design, is in the minority.

No decision dealing with the question here presented can fail to consider the effect of airport field rules, in addition to the care afforded by the operator in the particular instance.

WILLIAM G. CAPLES.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—[Missouri] Compensation was claimed by the daughter of Sidney Crutcher, an inspector of the Curtis-Robertson Airplane Manufacturing Co., who was killed in an airplane accident. Crutcher's duties consisted of directing the activities of the inspectors and putting an official approval on all the machines manufactured. It was also necessary for him to sign certain "packing sheets" when a plane was completely inspected and ready for delivery. On some occasions Crutcher's duties required him to go into the air with the test-pilot employed to take the finished planes from the factory to the hangar, but it was generally understood that he had to obtain permission to go up. A few minutes before the accident Crutcher was sitting in the rear seat of the plane, which the factory had just completed, and while he was looking over the "packing sheets," the test pilot entered. Upon being informed that the pilot was taking the plane to the hanger deceased agreed to go along, although he had not express permission to do so. Crutcher was killed when the plane crashed. The "packing sheets" were found near the scene of the accident, some of them unsigned. *Held:* The accident arose out of and in the course of the employment within the meaning of the Compensation Act. *Crutcher* v. *Curtiss Robertson Airplane Mfg. Co.* (Mo. Sup. Ct., Sept. 3, 1932) 1932 U. S. Av. R. 259.

This case gives rise to the question much litigated in compensation cases as to when an accident arises or does not arise "out of" and "in the course of the employment." In regard to this problem, quoting from Wrenbury, L. J., "No recent act has provoked a larger amount of litigation than the Workmen's Compensation Act. The few and seemingly simple words 'arising out of and in the course of employment' have been the fruitful source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion."[1]

There have been very few cases in air law involving the precise question in controversy. However, a review of these cases may be somewhat illuminating. A salesman for a baking company, who travelled in an airplane, distributed advertising matter, and took customers for rides at the direction of the employer, was injured when the plane fell during a testing flight. The court held that the accident arose "out of" his employment.[2] A pilot, while flying with passenegrs for hire, made a power dive in violation of the Air Commerce Regulations and his employer's instructions, and

1. *Herbert* v. *Fox*, A. C. 405, 419 (1916).
2. *Schonberg* v. *Zinsmaster Baking Co.*, 173 Minn. 419, 217 N. W. 491 (1928).

the accident that occurred was held not to be "in the course of" his employment.[3] For the purpose of deducing the general doctrines or formulae that have been built up around the phrase "arising out of and in the course of the employment" which is present in the majority of state compensation acts, it is necessary to rely on cases other than those involving aviation, but the general principles evolved can be applied to the field of aviation with little difficulty.

The test that has been generally recognized is that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform; and the injury "arises out of the employment," where there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.[4]

The violation of rules or instructions of the employer does not take the employee out of the scope of his employment, where such rules relate only to the manner of performing the tasks which he is directed expressly or impliedly to perform.[5]

In the *Frint Motor Car Co.* case, supra, a similar situation was present, involving the violation of an instruction of the employer. There the court stated that, although the employee did not attempt to render the services at the place where he was told to perform them, nevertheless he was attempting to perform a service for the employer just as truly as if he obeyed the instructions. This same reasoning is applicable to the present case where, despite a violation of an instruction of the company in going up in the plane without consent, Crutcher nevertheless was performing a service for his employer. Using the language of the general test he was doing the duty of inspection for which he was employed, and the causal relation between his employment and the resulting injury was quite evident.

The courts are practically unanimous in holding that the words "accident arising out of and in the course of employment," as used in compensation acts should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized.[6] A factor that has influenced the courts to administer compensation acts in a liberal rather than in a technical or metaphysical fashion is that of "capacity to bear the loss." The courts have felt that the insurance companies with whom the employers have insured, are better able to bear the loss than the injured employee or the latter's dependants.[7]

In the last analysis the question is one that must be decided alone on the facts of each particular case, analogies from other cases not being very helpful. In the light of the facts of this case and in accordance with the

3. *Sheboygan Airways, Inc.* v. *Sigma Fields and Industrial Comm. of Wis.*, 1932 U. S. Av. R. 229 (Feb. 15, 1932).

4. *In re McNicol*, 215 Mass. 497, 102 N. E. 697 (1913); *Mueller Construction Co.* v. *Indus. Bd.*, 283 Ill. 148, 118 N. E. 1028 (1918); *Heitz* v. *Ruppert*, 218 N. Y. 148, 112 N. E. 750 (1916); *Amys* v. *Barton*, 1 K. B. 40 (1912).

5. *State ex rel. Storm* v. *Hought*, 56 N. D. 663, 219 N. W. 213 (1928); *Milwaukee* v. *Industrial Comm.*, 160 Wis. 238, 151 N. W. 247 (1915); *Frint Motor Car Co.* v. *Industrial Comm.*, 168 Wis. 436, 170 N. W. 285 (1919).

6. *Eugene Dietzen Co.* v. *Industrial Bd.*, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918-B, 764; *Holland-St. Louis Sugar Co.* v. *Shraluka*, 64 Ind. App. 545, 116 N. E. 330 (1917).

7. *E. F. Albertsworth*, "Constitutionality of California Law Allowing Compensation," 27 Ill. Law Rev. 422 (1932).

broad interpretation which should be given the act, the result reached by the court effectuates its humane purpose and is legally a justifiable one.

HAROLD KOVEN.

## DIGESTS

CONTRACTS.—[New York] Plaintiff was to be a passenger on a trans-atlantic flight in the dirigible "Graf Zepplin." One of the conditions of his passage thereon was his agreement not to interfere with a grant by the operators of the Zepplin to another party of exclusive news rights covering the flight. Plaintiff made a contract with the defendant to send to it (under the guise of messages to friends) news stories of the flight. It does not appear whether defendant knew of the condition accompanying plaintiff's right of passage. In a suit on the contract, defendant sets up the fact of plaintiff's agreement with the operators as a defense. *Held:* that the defense is good. *Reiner* v. *North Am. Newspaper Alliance,* 259 N. Y. 250, 181 N. E. 561, 1932 U. S. Av. Rep. 279 (1932).

The majority opinion (Hubbs, O'Brien and Crouch, JJ.) bases its decision on the following line of argument: (1) One who wilfully and without reasonable justification induces another to breach his contract with a third person commits a tort; (2) The same result follows where the contract with the third party is broken, not because of inducement but because the actor has made performance by one party impossible; (3) A court will not aid a tort-feasor to recover a benefit founded on his tortuous act.

Pound, C. J., concurred on the ground that: (1) plaintiff's act of taking passage under the circumstances was a fraud on the operators of the Zepplin; (2) such a tort debars him from recovery.

Crane, J., concurred on the ground that: (1) Plaintiff's conduct was a breach of the trust imposed in him by the operators; (2) This immoral conduct bars him from relief in a court of justice.

Lehman, J., concurred on the ground that: (1) Plaintiff was under a general duty to refrain from inflicting wilful harm on another; (2) That his conduct here fell within that classification, and (3) That a court will not aid a wilful wrongdoer.

For discussions of the non-aviation law problems presented by this case, consult: 19 Va. L. Rev. 79 (1932); 46 Harv. L. Rev. 158 (1932); 32 Col. L. Rev. 1236 (1932).

ROBERT KINGSLEY.

CONTRACTS—SALES—GUARANTY.—[New York] Plaintiff had made a contract of sale of a Bellanca seaplane to be constructed according to specifications. Defendant had guaranteed payment of the purchase price up to $10,000, paying $2,000 on account. The contract called for title to remain in the vendor until full payment was made. Plaintiff, without receiving payment, transferred title to the vendee who, for consideration, re-transferred it to a third person. *Held:* (1) This transfer constituted a material alteration of the defendant guarantor's contract and, therefore, discharged him; (2) The contract of guaranty having been breached by the promissee, any payments made thereon must be returned to the guarantor. *Bellanca Aircraft Corp.* v. *Pere,* 256 N. Y. S. 234, 235 App. Div. 89 (1932).

ROBERT KINGSLEY.

DAMAGES — WRONGFUL DEATH — AMOUNT OF VERDICT.—[New Jersey] Plaintiffs, as administratrixes, recovered verdicts for the deaths of their intestates as a result of an airplane accident. The defendant moved for a new trial on the ground *(inter alia)* that the verdicts were excessive.

Plaintiff *B* recovered a verdict of $38,000. Her intestate was 37 years of age, his wife (the plaintiff) was 28. There were no children. He left an estate of about $28,000. Deceased's income came principally from stock

market speculations and he had been turning over to his wife from $60 to $100 per week. It was not shown how much these payments averaged or how much thereof was expended for deceased's living expenses. *Held:* verdict excessive insofar as it exceeds $25,000.

Plaintiff *A* recovered a verdict of $33,900. Her intestate was 27 years of age, unmarried and living with his mother (the plaintiff) to whom he turned over some $40 or $50 per week, derived from the same sources as *B's.* His estate was about $25,000. *Held:* verdict excessive insofar as it exceeds $15,000. *Boele, Administratrix* v. *Colonial Western Airways,* 158 Atl. 440, 1932 U. S. Av. Rep. 51 (N. J. Sup. 1932).

ROBERT KINGSLEY.

GASOLINE TAX—STORAGE OF GASOLINE USED IN INTERSTATE COMMERCE.—[Tenn., and U. S. Supreme Ct.] A Tennessee statute (Chapter 58, Acts of 1923) imposed a tax upon all persons, corporations, etc., engaged in the business of "selling" gasoline in the state. Chapter 67, Acts of 1925, enlarged the scope of the law so as to include "storers" and "distributors" of gasoline. It provided that "storers and distributors should compute and pay this tax on the basis of their withdrawals or distributions" and that the tax should accrue whether such withdrawal be for sale "or other use." The plaintiff, a non-resident corporation and common carrier, was engaged in hauling and transporting by aeroplane from points outside the State of Tennessee to cities within the State of Tennessee, and from points within the state to points outside. It bought its gasoline outside of the state, bringing it into the state and storing it in private tanks to be withdrawn when needed. It was averred that the gasoline was not, and would not be withdrawn from storage for any other purpose whatever. This was a suit in equity to enjoin the collection of the tax on the ground that it imposed a burden upon interstate commerce. *Held:* injunction denied. The statute did not impose a property tax upon the gasoline, but imposed an "excise" or "privilege" tax upon the business of storing and withdrawing the gasoline, the amount to be computed upon withdrawals. The storage and withdrawal, being completed in Tennessee, was an intrastate transaction, and not a transaction in interstate commerce. It was a business subject to "privilege" or "excise" tax. There is an obvious distinction between taxing gasoline used in interstate commerce, and taxing the business of storing within the state, and distributing or allowing the same to be withdrawn from storage for sale "or for other use." *American Airways, Inc.* v. *Wallace et al.,* 57 F. (2d) 877, 1932 U. S. Av. Rep. 209 (D. C. Tenn. 1932), discussed in 3 JOURNAL OF AIR LAW 468, was affirmed by a per curiam opinion of the United States Supreme Court, 53 Sup. Ct. 15, 77 L. Ed. (Adv. Ops.) 12. (Oct. 10, 1932).

DAVID AXELROD.

INSURANCE—FIRE—INTERPRETATION OF CLAUSE "WHEN AIRCRAFT IS IN FLIGHT."—[Federal] The plaintiff's plane was insured against "fire . . . arising . . . while the airplane is not in flight and including loss or damage from fire or explosion arising during, or as a result of, the starting, attempting to start, or running of any engine installed in the aircraft." On a flight from Syracuse, New York, to Florida, engine trouble developed and an emergency landing was effected on a snow covered field. The airplane rolled from thirty to fifty feet, then overturned. Not more than two minutes later a fire was discovered about the motor, a fire which completely destroyed the plane. In the ensuing action on the plaintiff's insurance policy, the defendant moved to dismiss, (1) on the ground that the loss did not fall within the provisions of the policy, and (2) that the proximate cause of the loss was something which occurred while the plane was in flight and, consequently, was not a risk insured under the policy. The policy read: "The aircraft shall be deemed in flight from the time it starts taxiing immediately prior to and for the purpose of taking off, during the take-off, actual flight, descending, landing and taxiing immedi-

ately after landing until it reaches a terminal or parking or mooring place" and "the aircraft shall be deemed not in flight when in the hangar or elsewhere on the ground or water, except when taxiing in flight as hereinbefore defined." *Held:* by the judge, that the facts were undisputed and "did not bring this case within the provisions of the policy covering an airplane when not in flight." *Bresee* v. *Automobile Insurance Company,* 1932 U. S. Av. R. 53 (U. S. D. C., N. D.-N. Y., Apr. 25, 1932).

GEORGE W. BALL.

INSURANCE—INCONTESTABLE CLAUSE—EFFECT OF ON A LIMITATION FOR ENGAGING IN AVIATION.—[New York] This action was brought by the beneficiary of a policy of insurance issued by defendant on the life of Wallace R. Chapin. The policy provided that during the first two years of the policy the insured was not to take an airplane flight "otherwise than as a passenger who is not owner of the conveyance, without the written consent of the company and the payment of extra premiums as the company may determine." It was further provided that "should the death of the assured occur during the first two years of this policy directly or indirectly as a result of his so engaging in any branch of aeronautics or of making the aerial flights referred to above without paying the extra premium required by the company, the liability of the company shall be limited to the return of all premiums paid." The defendant brought itself within the provisions of the limitation by pleading that Chapin did engage in aviation without the consent of the defendant during the proscribed two year period. The plaintiff in its second amended reply relied upon a clause which read: "After two full years from its date of issue this policy shall, subject to the payment of premiums and to the terms of such disability and double indemnity benefit privileges (if any), as form a part of this contract, be incontestable." The defendant moved to strike out this part of the second amended reply for legal insufficiency. *Held:* motion granted. *American Home Foundation Inc.,* v. *Canada Life Assurance Company,* 1932 U. S. Av. R. 55 (N. Y. S. C., Spec. Term, Nov. 11, 1931).

For a discussion of the question raised by this case, see a comment on *Leidenger* v. *Pacific Mutual Life Ins. Co.,* 2 JOURNAL OF AIR LAW 602 (1931).

GEORGE W. BALL.

MASTER AND SERVANT.—[Arkansas] *G* was employed as a mechanic in repairing an airplane belonging to one *W.* Needing an automobile with which to get some materials, he secured the use of one belonging to defendant. According to some testimony, *G* was to take defendant to a theatre and later pick up defendant at the theatre. After leaving defendant and while on the way to the airport with the materials, *G* had an accident in which plaintiff's car was injured. *Held,* there is no evidence to show that *G,* at the time of the accident, was on any business of the defendant or that the relation of master and servant existed between them. *Ricks* v. *Sanderson,* 49 S. W. (2d) 604 (Ark. 1932).

ROBERT KINGSLEY.

NEGLIGENCE—COMMON CARRIER—UNAVOIDABLE ACCIDENT.—[Illinois] Plaintiff sued for $100,000 damages for personal injuries arising out of an aeroplane accident. The defendant's plane in the course of landing at an intermediate field struck a tree about 400 feet from the edge of the field. Although the field, approved by the Department of Commerce, was marked with obstacle and boundary lights, the tree struck by the plane was not marked by an obstruction light. On behalf of the plaintiff the court gave the following instructions: (1) it was the duty of common carriers to do all that human care, vigilance, and foresight can reasonably do under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries, and if they neglect so to do they are to be held strictly responsible for all

consequences which flow from such neglect; that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger, if the passenger is, at the time of the injury, exercising ordinary care for her safety. . . . On behalf of the defendant, the court instructed the jury: (8) that the defendant was not a guarantor or insurer of the safety of the plaintiff, but that under the law it was only required to exercise the highest degree of care in the management and control of the aeroplane consistent with the practical operation of the same . . .; (9) that the law does not exact or require of an aeroplane company that its servants should be all the while upon their guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences, nor does it require them to conduct their business with a degree of caution that would prevent the practical operation of their business; . . . (16) that it is not every accident which makes an aeroplane company liable for damages for a personal injury. If the accident was unavoidable as far as the aeroplane company is concerned then no liability is incurred by it. . . . *Held:* The jury rendered a verdict in favor of the plaintiff for $10,000. An appeal has been taken to the Appellate Court of Illinois. *McCusker* v. *Curtis-Wright Flying Service, Inc.,* 1932 U. S. Av. R. 100 (Circ. Ct., Cook County, Ill.).

DAVID AXELROD.

TORTS—LIBEL AND SLANDER—THEFT OF AIRPLANE.—[Virginia] Defendant was the owner of an airplane, which plaintiff had been permitted to use on several occasions. On the day in question, plaintiff claims to have been again granted authority to use the plane. This the defendant denies. The plane fell and was damaged. After plaintiff's refusal to pay for repairs, defendant caused his arrest on a charge of stealing the plane. This charge was dismissed on the preliminary hearing and plaintiff brought an action for slander, recovering a verdict of $2,000. *Held:* (1) the evidence supports a finding for the plaintiff; (2) the verdict is not excessive. *Weatherford* v. *Birchett,* 164 S. E. 535 (Va. 1932).

ROBERT KINGSLEY.

WORKMEN'S COMPENSATION—DEATH OUTSIDE OF STATE WHERE EMPLOYMENT CONTRACT MADE.—[New York] An airplane pilot, while working for a Connecticut corporation under a contract made in New York, was killed in Connecticut while piloting an air plane from Boston, Massachusetts to Newark, New Jersey. *Held:* his widow was entitled to compensation under the New York statute on the ground that his place of employment was in New York. *Colonial Air Transport, Inc., et al.* v. *Tallman, and State Industrial Board,* 259 N. Y. 6, 234 App. Div. 809, 253 N. Y. S. 938 (no opinion) affirmed (1932).

DAVID AXELROD.

WORKMEN'S COMPENSATION — EMPLOYER AND EMPLOYEE — INDEPENDENT CONTRACTOR—COURSE OF EMPLOYMENT.—[California] Petitioner asks the annulment of an award of the California Industrial Accident Commission, awarding compensation to the claimant. The District Court of Appeal annulled the award on the ground that the relation of employer-employee did not exist. *Murray* v. *Industrial Accident Commission,* 69 Cal. App. Dec. 216, 10 Pac. (2d) 97 (April 7, 1932), discussed and criticized in (1932) 3 JOURNAL OF AIR LAW, 470. On hearing in the Supreme Court of California it was *held,* that the relation did exist and, therefore, that the award should be affirmed. *Murray* v. *Industrial Accident Commission,* 84 Cal. Dec. 258 (Sept. 16, 1932).

The facts as stated in the opinion of the Supreme Court present a somewhat different picture than when interpreted by the District Court of Appeal:

(1) The Supreme Court finds that an employer-employee relationship was created: (*a*) The fact that claimant's compensation was sufficient merely to cover his living expenses did not affect his status as an employee: "A person may work for his board and lodging, and during such employment he is just as much an employee as if he were paid a stipulated sum per day, or for any other fixed period of time. The sum paid might be only enough to pay his board and lodging, or it might be more, or even less. The amount of wage has no bearing whatever upon the relation existing between him and his employer." (*b*) Petitioner had the right to control the manner of claimant's conduct of the flight and had, in fact, dictated the route and given other instructions. "It is the right to exercise control, and not the exercise of that right which determines whether the person performing the service is an employee or an independent contractor."

(2) Since the evidence shows that petitioner was engaged (although as a "side-line") in selling airplanes, claimant's employment was within petitioner's business and was not casual.

(3) The evidence does not show that claimant knew that a specific plane had been allotted to petitioner by the vendor, or that he was to fly that particular plane only. He was directed by petitioner to accept "*a*" plane of a certain model from the vendor, which he did. Consequently, in the absence of such knowledge on the part of claimant, he cannot be said to have departed from the scope of his employment in accepting and flying the plane actually tendered him by the vendor.

ROBERT KINGSLEY.